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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., AND
NORTHERN FREIGHT LINES, INC.

vs.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

BRIEF OF INTERVENING RESPONDENT, TRANSCON LINES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF INTERVENING RESPONDENT, TRANSCON LINES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Transcon Lines, Intervening Respondent, in the United States Court of Appeals for the Fourth Circuit, in opposition to the Petition for a Writ of Certiorari, hereby files its Brief in Opposition to the Petition of Akers Motor Lines, Inc., of Delaware, Akers Motor Lines, Inc., of North Carolina, Central Motor Lines, Inc. and Northern Freight Lines, Inc.

QUESTION PRESENTED

Transcon Lines respectfully states that the question presented in the petition is inaccurately or incompletely stated. The United States Court of Appeals for the Fourth Circuit (Petitioners' Brief, App. 59a) reviewed the action of the Interstate Commerce Commission (the Commission) in denying the letter petition filed August 15, 1976, so the real question presented is whether the Court of Appeals has committed an error by finding "no abuse of discretion" by the Commission in denying the untimely filed letter petition or the two subsequent petitions.

STATEMENT OF THE CASE

Transcon would supplement the statement of the petitioners because it is virtually devoid of facts:

References herein are abbreviated as follows:

"Appendix" refers to Petitioners' Petition for Writ of Certiorari by page.

"JA" refers to the Joint Appendix filed in the Court of Appeals.

"R." refers to the Certified List of Documents filed by the Commission.

Akers-Delaware controlled Akers-North Carolina which sought to acquire control of Central by a purchase of the Central capital stock under MC-F-12321. Northern was a wholly owned subsidiary of Central (JA 170-171).

The parties realized that the Akers-North Carolina rights were virtually duplicative[1] of Northern and Central. Accordingly, pursuant to 49 CFR 1134.51(a)(2), and *Control or Consolidation of Motor Carriers, Ex Parte No. MC-79,* 109 M.C.C. 448 (1970), the parties notified the Commission of the duplicating rights and of their intention to eliminate the duplication by sale (JA 56, 57 and 58). See Exhibits G and H (JA 252-276), where Mr. Garland Moore for the petitioners sets out these duplications in detail.

1. Duplicating authority is where operations are possible over the same routes and highways, and between the same points.

Akers-Delaware received temporary authority from the Commission to manage Central and Northern pending approval of the sale of the Northern stock, and this temporary authority also gave Akers authority to sell duplicative rights subject to consent of the Central stockholders and Commission approval.

Pursuant to 49 CFR 1134.51(a)(2) and the power of sale, Akers-Delaware and Akers-North Carolina entered into a contract with Transcon February 13, 1975 and caused Central and Northern to contract with Transcon to sell the duplicating authority of Central and Northern (JA 105, 115).

The original contract called for less than all of the Central and the Akers-North Carolina Sub 12 authority which duplicated the other Akers and Central authority subsequent to the contract between Transcon and applicants. In a May 1, 1975 letter to the Commission (R. 48, JA 58), counsel for petitioners, in MC-F-12321, specifically recognized the problem of duplication and spelled out that the applicant, Akers-Delaware, proposed to dispose of the duplicating operating rights of Central, Northern and Akers-North Carolina, in accordance with Commission requirements citing 49 CFR 1134.51(a)(2) and as intended in the application Item 5 (JA 56-57). This letter spells out a plan, as requested by the Commission, to dispose of duplicating authority.

On June 12, 1975, Transcon, Akers-Delaware, Akers-North Carolina, Northern and Central, jointly filed for Commission approval in MC-F-12557, to acquire rights under the contract (JA 105-115). The original contract was amended August 29, 1975 (JA 147-150), and likewise, the application was amended and the parties agreed Transcon would purchase either all of the Central duplicating authority or a part of Central and Akers-North Carolina Sub 12, in the alternative, to allow the Commission to make a finding as it saw fit and as best served the public interest.

In the opening statement before the Commission, counsel for petitioners again stated to the Administrative Law Judge their intention to dispose of the duplicating operating rights (JA 172).

A number of protests were filed in MC-F-12557 to the acquisition by Transcon of the duplicating rights. The protestants feared a new aggressive competitor. At the hearing, following the direct and cross-examination of the President, shareholder and former Chairman of the Board of Central, and in response to the urging by the petitioners, Transcon proposed the following restriction which resulted in all protestants withdrawing from the hearing (JA 43):

> "The operations authorized herein are restricted to the transportation of shipments originating at or destined to points west of the Mississippi River and points west of the eastern boundary of Minnesota, except St. Louis, Missouri, East St. Louis, Illinois, and Davenport, Iowa, and their respective commercial zones, as are now or hereafter defined by the Commission."

After the protestants withdrew, the evidence proceeded upon the proposition that Transcon was buying the

same rights as before but that said rights were being accepted by Transcon with a restriction (JA 45). The purchase agreement previously executed by Transcon and Akers was amended to reduce the purchase price by $600,000 (JA 322). Likewise, Central amended its Stock Purchase Agreement reducing by $600,000 the price to be received by the shareholders. Thus, the reduction in the purchase price was not absorbed by petitioners, but was in fact absorbed by the individual shareholders. Transcon was buying the same rights, but "providing certain restrictions on *utilization* of the operating rights being purchased." (Ex. 7, ¶C) (JA 319).

The Verified Statement of Marvin F. Lourie, President of Akers-Delaware and Akers-North Carolina, Ex. 13 (JA 334) at page 9 (JA 343), states the

> "Purpose of the transaction in MC-F-12557 is to transfer the *entire* Central Motor Lines operating authority in South Carolina or to transfer the Akers Motor Lines Sub. 12 certificate to Transcon Lines." (Emphasis added)

The Commission granted permissive approval of the sale by its Order of May 12, 1976 (Appendix 1a) which became the final Order of the Commission on June 12, 1976, by operation of law. Title 49 U.S.C. 17.9(d) further provides that the Order shall become effective 30 days after service. In attempting to acquire jurisdiction, the petitioners referred to the July 20, 1976 Order [Appendix 43(a), R. 107, JA 27] which was issued by mistake as evidenced by R. 110 and R. 111.

The parties consummated the sale to Transcon on July 26, 1976 after all orders had become final, and notified the Commission of that fact. Petitioners and Transcon relied upon R. 110 and R. 111 to render the July 20, 1976

Order void although petitioners seem to be still improperly relying on this erroneous order.

During the time for administrative review, which had expired at the latest 60 days after the May 12, 1976 Order, the sellers had taken no action nor had any party filed exceptions or a petition for reconsideration with the Commission. Petitioners accepted the $2,400,000 proceeds and executed the papers to transfer the rights to Transcon in accordance with the contract documents and the intent thereof.

Petitioners' subsequent letter filings with the Commission were not treated by Transcon as sufficient to invoke jurisdiction of the Commission as the May 12, 1976 Order had become the Order of the Commission by action of law and time for exceptions and reconsideration had passed. The status of this matter is that petitioners waived and are now estopped from raising any present arguments by virtue of having consummated and accepted the money for the transfer of the restricted rights.

The Commission and the United States Court of Appeals for the Fourth Circuit have reviewed and considered the August 15, 1976 letter petition and subsequent petitions filed in light of the facts of closing and consummating the contract and the resultant waiver and estoppels raised by having accepted the money for the transfer of the restricted rights.

The action of the Commission was no abuse of discretion because the record in the case clearly demonstrated that petitioners, when they conclude the merger of the companies (i.e., the Akers, Northern and Central authorities retained after the sale to Transcon Lines), can provide transportation to the same points which they claim have been lost. The missing element in the whole transaction

is for the petitioners to carry out the balance of their commitments to the Commission for merger so the surviving entity will be able to provide complete service as originally contemplated, agreed by all the parties and represented to the Commission.

ARGUMENT

THE PETITIONERS HAVE HAD ADMINISTRATIVE AND JUDICIAL REVIEW ON THE MERITS

A. The United States Court of Appeals and the Commission have considered and denied, on the merits, the matters which petitioners claim have not been considered.

The petitioners argued before the Court of Appeals that the Commission abused its discretion and improperly denied the various out-of-time letter petitions and subsequent filings. Now, the petitioners argue that the Court of Appeals has refused judicial review when in fact the opposite is true.

The Court of Appeals, in its opinion denying petitioner's Petition for Rehearing, Appendix A, page 59a, proceeded to reach the merits and held:

> "Nor does it appear that the Commission abused its discretion in denying the letter petition filed August 15, 1976, or in denying the two subsequent petitions. The granting or denying of a petition to reopen the proceedings is within the sound discretion of the Commission and only upon a showing of a clear abuse of that discretion, could th[illegible] Court overrule its denial of the petitions."

The Court then proceeded to note that the letter petition was filed out of time, and additionally noted that the petitioners had consummated the transaction with Transcon Lines, had filed no exceptions, offered no reason for the "unexplained delay" in filing of the letter petition and the "undesirable results" that would have been created by "reopening the case." Transcon would ask this Court to recognize that in the orders of the Commission and the Court of Appeals, the merits have been continually under consideration and reviewed at each stage of these proceedings and the petitioners have created a completely false impression by their brief when they limit the question to whether or not the Court refused to review the Commission orders solely because the proceedings had become administratively final. These petitioners have had their day in Court at least a half a dozen times and the fact that they do not like the results, which have been consistently against them, does not justify this Petition for a Writ of Certiorari. Transcon Lines paid $2,400,000 in reliance upon the petitioners' acceptance of the final orders of the Commission adopting the Administrative Law Judge's Initial Decision.

The undesirable results mentioned by the Commission and the Court of Appeals, upon a reopening of this case, have to do with the fact that Transcon Lines bought and paid for certain rights from the parties following final Commission decision. The argument petitioners have tried to make about rights being cancelled or lost has absolutely no merit because the Commission clearly recognized that, under the representations made by petitioners to the Commission in the consolidated cases, they would have, by the merger of the various operating companies, retained service to all the points that are involved in this request for alleged loss of rights.

B. Agency and judicial action must have a termination upon which affected parties can rely.

I. The May 12, 1976 Order Is Not Reviewable Under the Hobbs Act.[2]

Judicial review of orders of the Interstate Commerce Commission can only be had if an appropriate petition is filed in accordance with the provisions of the Hobbs Act. As pertinent, the Hobbs Act states:

> "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The 60-day requirement of the petition to review is jurisdictional. *Microwave Associations, Inc.* v. *F.C.C.*, 515 F.2d 385, 388-389 (D.C. Cir. 1974); *B. J. McAdams, Inc.* v. *Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir. 1977). To show that the instant petition for review of the May 12, 1976 order is not timely, a somewhat detailed review of the proceedings before the Commission is necessary.

This proceeding commenced when Akers Motor Lines, Inc. filed an application seeking Commission approval of a transaction that would, among other things, result in Akers controlling Central Motor Lines, Inc. through ownership of stock. Such approval is necessary under Section 5 of the Interstate Commerce Act, with the Commission having jurisdiction to condition its approval of the transaction upon such terms and conditions as it deems just and reasonable. 49 U.S.C. §§ 5(2)(a) and 5(2)(b). The Commission's order approving the transaction, however, is merely permissive, and the parties have the right *not*

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2. 28 U.S.C. §§ 2341, et seq.

to consummate the transaction if they object to terms and conditions imposed by the Commission.

Subsequent to the filing of the petition by Akers-Delaware, seeking control of Central and Northern, an application was filed in which Transcon sought to acquire a portion of the operating authority of Central and Northern. Both applications were assigned for oral hearing before an Administrative Law Judge of the Commission and several carriers appeared in opposition. At the hearing, the interest of protestants was settled through the imposition of a restriction on the operating authority transferred to Transcon, and protestants offered no evidence. Following the hearing, the Administrative Law Judge issued an initial decision approving the transactions subject to the requested restriction that the operating rights of Central as set forth in Appendix A of his decision be sold to Transcon Lines, and that only the rights in Appendix B to his decision be retained by Central and Northern. That order was served May 12, 1976, a copy of which is set forth in Appendix A to the Petition herein. No party filed exceptions to this initial decision and the order was not stayed by the Commission. Therefore, the May 12, 1976 order became the *final order* of the Commission by operation of law as required by Section 17(5) of the Interstate Commerce Act. 49 U.S.C. § 17(5). A notice to this effect was issued by the Commission on June 21, 1976, a copy of which is also set forth in said Appendix A, page 42a duplicated on page 43a. After receiving approval of the transaction by final order of the Commission the parties consummated the transaction on July 26, 1976, thereby accepting the lawfully imposed conditions that the operating rights in Appendix A of the report be sold

to Transcon and only those rights in Appendix B be retained by Central.[3]

At this point the entire proceeding was closed, a final order had been entered and the transaction had been consummated. Any petition seeking judicial review of a final Commission order approving a transaction under Section 5 of the Interstate Commerce Act, whether filed by those opposed to the transaction or those in favor of the transaction, clearly must be filed within 60 days of entry of the final order.[4] The Court of Appeals only has jurisdiction to review a final order of the Commission if a timely petition is filed, and since one was not filed, it could not entertain a petition seeking review of the final May 12, 1976 order. Because the Court of Appeals could not entertain a late-filed direct appeal of the May 12, 1976 order, it also could not entertain a collateral attack on that order under the guise of reviewing the subsequent April 28, 1977 and the June 16, 1977 orders. Compare *B. F. Goodrich Company* v. *Northwest Industries, Inc.*, 424 F.2d 1349 (3d Cir. 1970). This is particularly true in this case since the subsequent April 28, 1977 and the June 16, 1977 orders themselves are not reviewable because they constitute Commission action committed to Commission discretion under 5 U.S.C. § 701.

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3. It is worth noting that the conditions imposed by the Commission resulted in an adjustment in the amount Transcon paid for the rights it purchased. The entire reduction in the purchase price, however, was charged against the consideration paid to the stockholders of Central, with no value being given to the operating rights petitioners now claim were unlawfully cancelled by the Commission.

4. The petition seeking review of the May 12, 1976 order may be dismissed on the additional ground that petitioners did not exhaust their administrative remedies through failure to file exceptions as required by 49 U.S.C. § 17(5) and the Commission's rules. 49 C.F.R. § 1100.96.

Prior to 1975, judicial review of Commission decisions was subject to the provisions of the Urgent Deficiencies Act, 28 U.S.C. § 2312, *et seq.*, and there was no time limitation during which review of Commission orders had to be sought. The problems caused by open-ended judicial review were a primary reason for placing review of Commission orders under the Hobbs Act. *1974 United States Code Congressional and Administrative News*, p. 7028. If the Court of Appeals had found that review of the May 12, 1976 order was not subject to the 60-day requirement in the Hobbs Act, thereby allowing a collateral attack on that order, the Congressional purpose in subjecting Commission orders to the Hobbs Act would have been thwarted. Here, the May 12, 1976 order became the final order by operation of law. 49 U.S.C. § 17(5). Subsequently, a party requested that the Commission modify its final order, which request was denied. If the denial of a request to modify a final order opens the door to a collateral attack on the final order, the 60-day limitation period will be meaningless. There would be absolutely no finality to an administrative order. Any party to a Commission proceeding could request the Commission to modify the terms of its final order. Upon denial, such party could then seek judicial review not only of the denial of its request but also of the issuance of the prior final order. Such a process of review would totally bypass the Hobbs Act contrary to Congressional intent. Therefore, to the extent that the petition before the Court of Appeals sought review of the May 12, 1976 order, the Court acted properly in denying it as an unlawful collateral attack on a final order not reviewable under the Hobbs Act.

II. The April 28, 1977 and June 16, 1977 Orders Are Not Reviewable.

The Court acted properly by denying review of the April 28, 1977 (Appendix A, page 48a) and June 16, 1977 (Appendix A, page 51a) orders since entry of these two orders constitutes agency action committed to agency discretion. Section 701 of the Administrative Procedure Act states that "This chapter applies except to the extent that . . . (2) agency action is committed to agency discretion by law." There is no longer any dispute that this provision limits the right of review set forth in Section 706 of the Administrative Procedure Act. However, the further issue of whether a matter is or is not committed to agency discretion presents difficult questions whose ultimate resolution is based on consideration of Congressional intent and on whether the subject matter of the agency order is appropriate for judicial review. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968). In this proceeding, an analysis of the subsequent procedures before the Commission will show that the Commission's decision not to modify its final order is clearly a matter Congress intended to be an exercise of nonreviewable agency discretion.

After the parties consummated the transaction pursuant to the final order of May 12, 1976, an officer of Central wrote a letter to Robert L. Oswald, the Secretary of the Commission, requesting that the Commission modify Appendix B to the final order to include additional operating rights. None of the parties to the proceeding before the Commission which would be adversely affected by the proposed modification thought it necessary to even reply to such a letter. Central's letter was only an informal request and the Commission was under no statutory duty

to act on it. Indeed, the Commission could have returned Central's letter, taken no action, or the Secretary of the Commission could have replied by letter. Herein, in its discretion, the Commission disposed of Central's letter by issuing an order reciting, among other things, that:

> ". . . no explanation is offered by the petitioners as to why no exceptions were filed to correct the alleged error in the initial decision, and as to why the subject petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision."

The Commission further stated that:

> ". . . in view of the unexplained delay in filing the instant petition . . . good cause has not been shown for granting the petition; . . ."

A copy of the Commission's order served November 11, 1976 is set forth in Appendix A (page 44a). In that order the Commission also informed Central that there was no merit to its claim.

Central and Northern subsequently filed petitions seeking reconsideration of the November 11, 1976 order and six motor carriers filed replies to those petitions and pointed out that the operating rights that Central sought to reinstate were the very rights the retention of which was objected to by protestants. Protestants further explained that withdrawal from the proceeding was based on an understanding that such rights would not be retained. The Commission issued an order served April 8, 1977 denying the petitions. This order is set forth in Appendix A (page 48a). Central and Northern then filed a joint petition before the Commission seeking a declaration that the proceeding involved an issue of general transportation importance. A copy of the Commission order served June

16, 1977 denying such petition is set forth in Appendix A (page 51a).

The nonreviewability of the Commission's April 28 and June 16, 1977 orders is clearly indicated by the Congressional intent and subject matter of the orders. The Congressional desire to have Commission action become final is evidenced by its passage of the Hobbs Act and Section 17(5) of the Interstate Commerce Act. Indeed, the benefits flowing from finality are obvious. It is the necessity to preserve these benefits that dictates that agency denial of requests to modify the *substance* of its final orders be placed within the sphere of unreviewable agency action. This point is amply demonstrated by testing the effect of judicial review on the discretionary Commission action exercised in entering the April 28 and June 16, 1977 orders.

First of all, petitioners could not seek judicial review if the Commission had refused to act on the letter of Central or if it had simply returned that letter. This kind of agency action has consistently been considered to be unreviewable. Compare *NLRB* v. *Tennessee Products & Chem. Corp., Roane El. F. Div.*, 329 F.2d 873 (6th Cir. 1964), where the NLRB refused to institute a complaint. The Commission's disposal of Central's letter request through the issuance of an order does not change the character of the agency's action and its nonreviewable nature is shown by the unwarranted and undesirable consequences of judicial review.

A finding that an agency's refusal to modify its final order is an abuse of discretion will ultimately and inevitably require the agency to reconsider its prior decision on the merits and issue yet another order disposing of the proceeding. That order then becomes subject to judicial review. In short, a finding that the agency abused

its discretion turns the disposition of a proceeding that was final and not reviewable on its merits under the Hobbs Act into a reviewable decision. This result so clearly conflicts with Congressional intent and is so destructive of the concept of finality that the agency discretion exercised in refusing requests to modify its order made final by law must be found to be agency action committed to agency discretion within the meaning of Section 701(a)(2) of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons intervening respondent urges that this Court enter an appropriate order dismissing the Petition for Writ of Certiorari.

Respectfully submitted,

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